STATE OF MICHIGAN
IN THE SUPREME COURT

ON APPEAL FROM THE COURT OF APPEALS
J.P. Hoekstra, P.J., W.C. Whitbeck, P.M. Meter, JJ.

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

vs

No. 120489

MELISSA ANN NUTT
Defendant-Appellant.

Lower Court No: 99-167397-FH
COA NO. 225887

BRIEF OF THE PROSECUTING ATTORNEYS ASSOCIATION OF MICHIGAN, AS AMICUS CURIAE IN SUPPORT OF THE PEOPLE OF THE STATE OF MICHIGAN

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Amicus answers: "NO"

Statement of Facts

Amicus joins the Statement of Facts of the People of the State of Michigan.

Argument

I.

Both the state and federal Constitutions protect an accused from being twice put in jeopardy "for the same offense." Defendant pled guilty to home invasion in the second-degree for a residential break-in in Lapeer County. Shotguns stolen from the residence were found concealed under a mattress in defendant's rental cabin in Oakland County. Defendant is not put "twice in jeopardy" by trial in Oakland County on the offense of concealing stolen property.

Defendant was convicted by her plea of guilty for a residential break-in occurring in one county. Shotguns taken in that offense were found four days after the break-in concealed under a mattress in defendant's rental cabin in another county, and defendant is charged in that county with receiving or concealing that stolen property. The trial court dismissed, finding that to try defendant for concealing stolen property after her conviction for home invasion would be to put her "twice in jeopardy" for the *same* offense. The Court of Appeals reversed in a 2-1 opinion, each judge writing on the matter, their disagreement going to the analysis of whether the two offenses were part of the "same criminal episode" so as to fall within this court's "same transaction" definition of "offense," though the offenses are *not* the same. In its grant of leave, this court specified that whether the same transaction test is a correct understanding of the protection against being twice put in jeopardy for the same offense is to be briefed, and has invited *amicus curiae* to file briefs on the point. Inherent in the question is whether *People v White* should be overruled. It is necessary, amicus believes, to undertake some small discussion of principles of *stare decisis* before approaching the underlying substantive question..

A. Stare Decisis

(1) Introduction

When faced with the question of overruling precedent, there are a number of approaches that a court might take regarding the doctrine of *stare decisis*. But for a court to ignore that it is changing the law, or only to nod in the direction of the prior authority while casting it aside, is inappropriate. Whether *People v White*[1] should be overruled is now before this court, and considerations arise, then, of *stare decisis*. But what consideration did *White*–itself an overruling decision–give to *stare decisis*? Precious little, and the failure of *that* court in this regard should inform the court's actions now.

In *People v Grimmett,*[2] the defendant was one of three men who held up a small grocery store in Detroit. The owner was shot and killed, and a customer wounded. Defendant was tried separately for the homicide and the assault, and was convicted of manslaughter and assault with intent to murder, respectively. To defendant's claim of double jeopardy based on the separate trials, the court said simply

> Defendant properly points out that in some cases multiple prosecutions are prejudicial to a defendant. In some cases multiple prosecutions may aid a defendant. Therefore, we believe a mandatory rule would be an unwise solution to this problem. Moreover, we believe that the type of rule proposed by the defendant, such as is found in the Model Penal Code, is properly a decision for the Legislature and not for this Court.[3]

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[1] *People v White*, 390 Mich 245 (1973).

[2] *People v Grimmett*, 388 Mich 590, 594-596 (1972).

[3] *Grimmett*, at 607.

The opinion contained no discussion of jeopardy principles at all, much less a principled discussion of the meaning of the word "offense" as employed in both the federal and Michigan Constitutions.

The next year the court changed its mind, saying that "we have concluded that *Grimmett* did not properly weigh the constitutional dimensions of the same transaction test" and overruling it, as though, in adopting the same transaction test, the court were overruling *only Grimmett*. This was simply not the case.

> A conviction in an inferior court of a misdemeanor does not constitute former jeopardy so as to bar subsequent prosecution for a felony *arising out of the same transaction.* The felony here charged being beyond the jurisdiction of the inferior court, and not included in any sense within the charge there laid, the defense of former jeopardy fails. ...*The transaction charged may be the same* in each case, but *if the offenses are different there is no second jeopardy* for the same offense.[4]

And the *White* court said nothing whatsoever regarding *stare decisis*.

Undoubtedly *stare decisis* will be argued now to shield *White* from itself being overruled. Though a thorough examination and development of a coherent theory of *stare decisis* is not possible here, amicus will briefly explore those principles that justify–if they do not mandate–correction of a decision that altered the constitution by misreading it.

(2) <u>A Written Constitution, and "Right Answerism"</u>

(a) <u>History</u>

The source of all political power and authority in this country is established –and for a very good reason– in the preamble to the Constitution: "We the people of the United States...do ordain and establish this Constitution for the United States of America." At the outset of our charter of

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[4] *People v Townsend,* 214 Mich 267, 275 (1921).

government it is made plain that the People stand above the government, the Constitution being a durable expression of their will as the Supreme Law of the Land, both enabling and limiting government.[5]

It was, after all, on this question of sovereignty –the pivotal question of the nature and location of the ultimate power of the State– that the Revolution was fought. As John Adams wrote to Thomas Jefferson in 1815, looking back on the founding of the country:

> What do we mean by the Revolution? The war? That was no part of the Revolution; it was only an effect and consequence of it. The Revolution was in the minds of the people, and this was effected from 1760 to 1775; in the course of fifteen years before a drop of blood was shed at Lexington.[6]

This revolution of mind took place as a reaction to the events of the 1760's and 1770's, and to the British conception of sovereignty.

A theory of sovereignty requires location of the authority to make law, which is the legislative power, and location of the constituent power, which is the power to begin, end, or alter the government, and which is superior to the legislative, executive, and judicial powers. After the English civil war, that country experienced successive claims to sovereign authority by the army and Oliver Cromwell. Theorists of the time consequently came to see a need for an embodiment of the will of the people in some *enduring* way that would not be subject to the changing times and the ambitions of those who governed. In 1656 Henry Vane published "A Healing Question," which actually called for what amounted to a constitutional convention to establish enduring "fundamental

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[5] This principle is equally applicable to state government. The Preamble to the 1963 Constitution ordains and establishes the Constitution in the name of "the people of the State of Michigan," and Article 1, § 1 provides that "All political power is inherent in the people."

[6] Bernard Bailyn, *I The Debate On The Constitution*, p.1.

constitutions" regarding the authority and limitations of government. Cromwell's response was to imprison Vane. The abuses of an unfettered protector came to be seen as worse than those of the old system of crown and parliament, and the result, after Cromwell's death, was the restoration of the monarchy in the person of Charles II, and a relocation of sovereignty back first in the crown, and ultimately in Parliament. By the 1760's parliamentary sovereignty was the orthodox political understanding in England, Blackstone writing that the "supreme irresistible, absolute, uncontrollable authority" –sovereignty– was lodged in parliament, whose actions "no power on earth can undo."[7]

The colonial experience that led to independence also led by the time of the debate on the ratification of the Constitution to an understanding that sovereignty is located in the people, who stand apart from and are superior to government. The British conception of the constitution as "that assemblage of laws, customs, and institutions which form the general system according to which the several powers of the state are distributed and their respective rights are secured to the different members of the community"[8] was foreign to the colonists. The events of the conflict with England of the 1760's and 1770's not only pushed the colonists toward a different view of popular sovereignty, but to the revolutionary view of a constitution as something distinct from and superior to the entire government.[9] As early as 1768, then, Samuel Adams wrote that "in all free States the

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[7] I Blackstone *Commentaries on the Laws of England*, p.156.

[8] Charles Inglis, *The True Interest of America...Strictures on a Pamphlet Entitled Common Sense*, p.18 (replying to Thomas Paine's *Common Sense*).

[9] Gordon S. Wood, *The Creation of the American Republic, 1776-1787*, p. 266.

Constitution is fixed; and as the supreme Legislature derives its Power and Authority from the Constitution, it cannot overleap the Bounds of it without destroying its own foundation."[10]

The colonists "recognized from the beginning that a constitution ought to be different in kind from ordinary legislation" and "ought to bear some sort of direct popular authorization that would place it beyond the power of government to change," embodying "the difference between the constituent power of the people and the legislative power of the people's representatives."[11] A constitution "should not be altered without the Consent, or Consulting with the Majority of the people."[12] By 1770 the constitution was said to be a "line which marks out the enclosure"; in 1773 it was the "standing measure of the proceedings of government" of which rulers are "by no means to attempt an alteration...without public consent." In 1775 it was said that the constitution was "certain great first principles" on whose "certainty and permanency the rights of both the ruler and the subjects depend; nor may they be altered or changed by ruler or people, but only by the whole collective body...nor may they be touched by the legislator."[13] Such a constitution must be written so as to acquire *permanence*, and, to stand above the government as the fundamental source of authority, it must represent the sovereign power; that is, the people, through an "act of all."[14]

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[10] Cushing, ed., I *Writings of Samuel Adams*, p. 185.

[11] Edmund Morgan, *Inventing the People: The Rise of Popular Sovereignty in England and America*, p. 256-258.

[12] Wood, p. 274.

[13] Bernard Bailyn, *Ideological Origins of the American Revolution*, p. 182.

[14] Bailyn, *Origins*, p. 183-189.

Because the people were sovereign and the "fountain of all power," and because the rights of the people could be protected only by a permanent constitution the alteration of which was not possible by any portion of the government, but only by the people, who possessed the "constituent power" of government, only a constitution based on the authority of the collective people could stand as more than the will of the legislature, superior to the government itself. As brilliantly expressed by Thomas Tudor Tucker in his pamphlet *Conciliatory Hints, Attempting by a Fair State of Matters, to Remove Party Prejudice*:

> The constitution should be the avowed act of the people at large. It should be the first and fundamental law of the State, and should prescribe the limits of all delegated power. It should be declared to be paramount to all acts of the Legislature, and irrepealable and unalterable by any authority but the express consent of a majority of the citizens collected by such regular mode as may be therein provided.[15]

This was, as Gordon Wood has said, "a conclusive statement that has not essentially changed in two hundred years."[16] What was required, then, to create a charter of government that was a durable expression of the will of the people, both authorizing and limiting government, and standing outside of and superior to all agencies of government, was a constitutional convention, consisting of delegates appointed to represent the people, called for that purpose, their handiwork to be presented to the people in turn in ratifying conventions called expressly for the purpose of ratification or rejection. Only then could the constitution be the supreme law and unalterable by the government. This was a "radical innovation in politics, signifying the transformation taking place in the people's

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[15] Wood, p. 281.

[16] Wood, p. 281..

traditional relationship with government."[17] The principle was so firmly established by the 1780's that "governments formed by other means actually seemed to have no constitution at all."[18]

In the ratification debates it was made clear that the people possessed the constituent power of government, and in exercising that power "the people fetter(ed) themselves by no contract....it is an ordinance and establishment of the people."[19] The people also possessed the legislative or lawmaking power, which, in a republican form of government, was delegated to their elected representatives, with all agencies of government established as the servants of the constitution, their duty being to execute the will of the people contained in the document. Executive and legislative –that is, political–authority, as well as judicial authority, is not conferred by election or appointment; rather, the individual filling the office gains the authority of that office, including the limits to that authority, previously constituted through the exercise by the people of their constituent power, expressed in a fixed constitution that is unalterable by government.[20]

The American political theory of popular sovereignty with a written and fixed constitution superior to ordinary legislation, rendering all members of the executive, legislative, and judicial branches representatives of popular sovereignty, has implications for the role of the judiciary. At the time of the Revolution, the judiciary was scarcely revered, but viewed with much the same suspicion as the magistracy or executive. If the legislature was not, as in England, to possess

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[17] Wood, p. 309.

[18] Wood, p. 342.

[19] Bernard Bailyn, I *The Debate On The Constitution*, p. 837.

[20] Keith E. Whittington, *Constitutional Interpretation: Textual Meaning, Original Intent, and Judicial Review*, p. 130.

sovereignty, but instead to act as servant of the people within durable constraints established by the people, a mechanism was necessary to insure that the legislature, which possessed the law-making authority, did not enact laws against the constitution and thereby against the rights of the people. Acts of the legislature had to be subject to the scrutiny of the people, and the judiciary, under the Constitution, was the servant of the people established in part for this purpose.[21] "The doctrine of judicial review...was inescapable once a written constitution was made supreme over legislation as an act of the sovereign people."[22] Included in the "judicial power" is the power of the judicial branch, as servant of the people, to keep the other branches of government within the limits of authority granted by the sovereign people in their constitution. But the judiciary is not a council of review, to examine legislation and the acts of the executive against its own view of that which is best, but only against the provisions of the Constitution; the role of judicial review occurs only incidentally as a part of the exercise of *judicial* power.

(b) Judicial Review

Of course, it was *Marbury*[23] that established for all time the judicial role with regard to constitutional construction. The Court in its opinion did so by recognizing fundamental principles of our government:

- That the people have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce

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[21] Wood, p. 456.

[22] Morgan, p. 260.

[23] *Marbury v Madison,* 1 Cranch 137, 163, 2 L Ed 60 (1803).

to their own happiness, is the basis on which the whole American fabric has been erected.

- The principles, therefore, so established are deemed fundamental. And as the authority, from which they proceed, is supreme, and can seldom act, *they are designed to be permanent.*

- The constitution is either a superior, paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and like other acts, is alterable when the legislature shall please to alter it....Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently the theory of every such government must be, that an act of the legislature repugnant to the constitution is void.

- If then the courts are to regard the constitution; and the constitution is superior to any ordinary act of the legislature; the constitution, and not such ordinary act, must govern the case to which they both apply.

- [I]t is apparent, that the framers of the constitution contemplated that instrument as a rule for the government of *courts*, as well as of the legislature. *Why otherwise does it direct the judges to take an oath to support it*?

- [T]he particular phraseology of the constitution of the United States confirms and strengthens the principle, supposed to be essential to all written constitutions, that a law repugnant to the constitution is void, and that *courts, as well as other departments, are bound by that instrument.*

That the people are sovereign under our form of government, and that the Constitution is the supreme law, intended to be permanent unless changed by the people, so that it bind "courts, as well as other departments," with the judiciary as the chosen instrument for protection of the Constitution from encroachment by the other branches of government, necessarily means that there are "right answers" to constitutional questions. If the judiciary is to be "bound by the instrument," it may not

put its "doctrine above the document."[24] After all, it is the Constitution which creates the courts, not the other way around. As Judge Easterbrook has put it, "judicial review came from a theory of meaning that supposed the possibility of right answers....,"[25] for if there are instead multiple "right" or permissible answers, no choice by any branch of government–including the judiciary–from within the field of permissible right answers can bind anyone else, and without a theory under which everyone must follow one answer, the theory of judicial review expounded by Chief Justice Marshall collapses.[26]

That especially in constitutional adjudication, where an erroneous decision effectively amends the constitution without action of the people as sovereign in a manner that only a subsequent amendment can repair, adherence to the document and not past doctrine is required is also demonstrated by the judicial oath. Justice Douglas once wrote that "A judge looking at a constitutional decision may have compulsions to revere past history and accept what was once written. But he remembers above all else that it is the Constitution which he swore to support and defend, not the gloss which his predecessors may have put on it."[27] And Justice Scalia has made the same point: "I would think it a violation of my oath to adhere to what I consider a plainly unjustified

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[24] See Akhil Reed Amar and Vikram David Amar, "How Should the Supreme Court Weigh Its Own Precedent," *Findlaw Legal Commentary*, http://writ.news.findlaw.com/amar/20021213.html.

[25] Easterbrook, "Alternatives to Originalism?", 19 Harv J L & Pub Pol'y 479, 486 (1995).

[26] See also Symposium, "Discussion: The Role of the Legislative and Executive Branches in Interpreting the Constitution," 73 Cornell L Rev 386, 399 (1988).

[27] Douglas, Stare Decisis, 49 Colum L Rev 735, 736 (1949).

intrusion upon the democratic process in order that the Court might save face."[28] The Supreme Court has itself said that "[W]hen convinced of former error, this Court has never felt constrained to follow precedent. In constitutional questions, where correction depends upon amendment and not upon legislative action this Court throughout its history has freely exercised its power to reexamine the basis of its constitutional decisions."[29] Justice Brandeis statement that "*Stare decisis* is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than it be settled right" is oft-cited as a shield for erroneous decisions, but as is generally the case in law, context is all. The *rest* of Justice Brandeis remark, generally omitted, tells the tale:

> This is commonly true even where the error is a matter of serious concern, *providing correction can be had by legislation.* But in cases involving the Federal Constitution where correction through legislative action is practically impossible, this Court has often overruled its previous decisions. The Court bows to the lessons of experience and the force of better reasoning, recognizing that the process of trial and error, so fruitful in the physical sciences, is appropriate also in the judicial function.[30]

After all, as one scholar has put it, "[W]hat is important in adjudication is reaching the right result–the just result, all things considered....our courts finally must rid themselves of the habit of thinking that adjudicative consistency holds some inherent value tugging them away from what is

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[28] *South Carolina v. Gathers,* 490 US 805, 825, 109 S Ct 2207, 2218, 104 L Ed 2d 876 (1989) (Scalia, J., dissenting), overruled by *Payne v Tennessee*, 501 US 808, 111 S Ct 2597, 115 L Ed 2d 720 (1991).

[29] *Smith v. Allwright,* 321 US 649, 665, 64 S Ct 757, 765, 88 L Ed 987 (1944).

[30] *Burnett v Coronado Oil and Gas Co.,* 285 US 393, 52 S Ct 443, 76 L Ed 815 (1932) (Brandeis, J. dissenting)(emphasis supplied).

just."[31] When involved is construction of a written text, in particular the governing instrument of the nation or state, that which the court seeks is not private justice, but public justice; that is, to carry out the will of the ratifiers as expressed through the text, history, and structure of the document designed as a durable expression of their will as sovereign, alterable only by means expressed in the document itself. This court has many times in its history understood the need to overrule an erroneous construction of a constitutional provision.[32]

To be sure, precedent furnishes a source of law, and in obeying his or her oath of office an appropriate humility should be expected of the judge.[33] But respectful consideration is not slavish obeisance, otherwise, constitutional mistakes such as "separate but equal" would have been impervious to judicial correction. A faithful review of the reasoning of the prior decision should be expected, but if the court is convinced that decision was poorly reasoned, or failed to take into account appropriate considerations, such as text, history, and structure of the fundamental document construed, then the court, to be faithful to its oath, must act. With these considerations in mind, amicus turns to *White*.

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[31] Christopher Peters, "Foolish Consistency" On Equality, Integrity, and Justice in *Stare Decisis*," 105 Yale L J 2031, 2113 (1996).

[32] See e.g. *People v Kazmierczak*, 461 Mich 411 (2000); *People v Collins*, 438 Mich 8 (1991); *People v Cetlinski*, 435 Mich 732 (1990).

[33] "One entrusted with decision...must also rise above the vanity of stubborn preconceptions, sometimes euphemistically called the courage of one's convictions. He knows well enough that he must disconnect his own predilections, of however high grade he regards them, which is to say he must bring to his intellectual labors a cleansing doubt of his omniscience...." Roger Traynor, "Reasoning in a Circle of Law," 56 Val L Rev 739, 750-751 (1970).

B. **The Michigan Constitution and White: The Break From the Federal Understanding**

Michigan has "gone its own way"–parted company from the interpretation of double jeopardy protections under the Fifth Amendment to the United States Constitution of the United States Supreme Court–with regard to the meaning of the word "offense." Three decades ago this court translated it as "transaction," a construction that is at once counter-intuitive and counter-etymological. This fundamental break with federal jeopardy principles under the Fifth Amendment[34] occurred on facts scarcely sympathetic to the accused. The female victim was kidnaped off the street in the city of Inkster by the defendant after the two had met at an after-hours drinking establishment, and assaulted by being struck in the head with a gun. The automobile into which the victim was forced was occupied by two other men as well as the defendant, and during the ride from Inkster to Detroit the defendant raped the victim. The defendant was convicted by a jury of kidnaping in the Circuit Court arising out of the charges brought in Inkster, and of rape and felonious assault by a jury in Detroit Recorder's Court for the crimes in the automobile. The claim was that the rape and felonious assault charges should have been brought together with the kidnaping charges; indeed, that the constitution compelled that result. In other words, it was alleged that the second trial put defendant "*twice* in jeopardy" on the offenses of rape and felonious assault, though *those* offenses had not been the subject of *any* trial, and thus defendant had *never* been in jeopardy as to them.

This court, relying largely on Justice Brennan's concurring opinion in *Ashe*, as well as cases from other states interpreting their own constitutions, concluded that *Grimmett* did not "properly

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[34] Though actually the court appears to have mistakenly anticipated that Justice Brennan's concurring opinion in *Ashe v Swenson,* 397 US 436, 90 S Ct 1189, 25 L Ed 2d 469 (1970) would someday carry the day in the United States Supreme Court. In fact, nowhere in *White* does the court purport to be adopting a separate "Michigan" rule under the Michigan Constitution, the court itself noting that the federal and state jeopardy provisions are essentially the same.

weigh the constitutional dimensions of the same transaction test."[35] The court reached this conclusion, and adopted the same transaction test, based on its view that use of the test "will promote the best interests of justice and sound judicial administration....A far more basic reason for adopting the same transaction test is to prevent harassment of a defendant."[36] The language of Michigan's jeopardy clause was not discussed; how the word "offense," as a matter of English usage, can mean "transaction" was not explained, nor was the history of Michigan's jeopardy clause, or prior Michigan jurisprudence, discussed. In short, the court adopted the same transaction test because four members of the court[37] thought it was the best policy, the court not even resting its holding on a view that it was compelled by a principled understanding of the Michigan constitutional provision.

(1) **Article 1, § 15 and the "Law the People Have Made": The Convention Record**

The Michigan Constitution of 1835 provided a jeopardy protection in Article 1, § 12, in language virtually identical to the Fifth Amendment: "No person for the same offence, shall be twice put in jeopardy of punishment." But that language was *narrowed* by the Constitution of 1850, which provided in article 6, § 29 only that "No person *after acquittal upon the merits* shall be tried for the same offense." This language was carried forward in Article 2, § 14 of the Constitution of 1908: "No

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[35] *White*, at 257.

[36] *White*, at 258.

[37] Justices Brennan and Coleman dissented; Justice Levin, having been on the Court of Appeals panel in the case, did not participate. Justice Brennan observed that "Obviously, the word *transaction* is broader than the word *offense*," and also noted that "it is patently impossible for a person to be twice convicted without having been exposed to the danger of being twice convicted."

person, after acquittal upon the merits, shall be tried for the same offense." Thus, when the Michigan Constitutional Convention of 1961 met it faced a situation where:

- the Fifth Amendment was inapplicable to the states, and
- Michigan's jeopardy provision provided by its clear language for *less* protection against multiple prosecutions as against state officials than the Fifth Amendment provided in the federal system as against federal officials.

This did not escape the notice of the delegates at the convention. It was recommended that the language be changed to "No person shall be put in jeopardy twice for the same offense." The committee on the judicial branch observed that while it appeared that the Convention of 1908 wished to limit jeopardy to acquittals on the merits, Michigan courts had never interpreted the clause as meaning what it said, but instead had substituted federal interpretations of the Fifth Amendment regarding jeopardy protection.[38] Delegate Ford spoke in favor of the change, stating that the language was taken by the committee "directly from the Alaska constitution, which duplicates the language in 24 constitutions of the United States and is in line with the federal constitution....we were taking safe language that was not open to semantic differences of opinion or construction...."[39] Mr. Stevens noted that "if you read the original provision, it might be difficult to understand why the supreme court has ruled that it means what we are putting in here now."[40] In other words, the delegates believed that this court had not read the Michigan jeopardy protection to mean what it said, but had read it as though its language read the same as the federal protection. In the view of the

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[38] Convention Record, p.542.

[39] Convention Record, p.543.

[40] Convention Record, at 543.

delegates, then, it made sense to use the language that the Michigan Supreme Court had read into the Michigan Constitution in any event, even though, from the language of the 1908 provision, "it might be difficult to understand" how the Michigan Supreme Court had managed to read "No person, after acquittal upon the merits, shall be tried for the same offense" to provide *state* jeopardy protection other than after an acquittal on the merits.

Attempting to clarify the proposed change, Mr. Boothby asked if "the wording of the present constitution would indicate that 'jeopardy' under the literal interpretation of the present constitution would not attach unless there was an acquittal," and Mr. Stevens responded that "That would seem to be what it says; but the Supreme Court of the State of Michigan doesn't agree...so we want to *make the constitution read the way the supreme court says it does read.*"[41] Mr. Boothby persisted with "one further question. Under the literal interpretation of the present constitution–and I don't mean what the courts have decided–but under the *literal interpretation of the words*, if the prosecution began a criminal case and the jury was empaneled, but on the motion of the prosecutor himself the case was dismissed–under the literal interpretation–a person could be tried again, is that not correct under the literal interpretation?" to which Mr. Stevens answered "That is correct, if I know what you mean by literal interpretation. That's what it seems to say."[42]

The provision was also considered by the committee on declaration of rights, suffrage, and elections, which reached a similar conclusion, as the drafted committee comment to the proposed new provision stated that: "The foregoing change in section 14 involves *the substitution of the double jeopardy provision from the Constitution of the United States* (except for the deletion of the

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[41] Convention Record, p. 544.

[42] Convention Record, p. 544.

ratified it...."[45] Both Justice Cooley and Justice Campbell spoke to the point in *People v Blodgett*,[46] where Justice Campbell observed that "The constitution is eminently a popular instrument, binding according to its terms, and requiring for their interpretation such rules as will not warp its sense from what its language shows it probably appeared to those who adopted it."[47] Further, "The constitution, although drawn up by a convention, derives no vitality from its framers, but depends for its force entirely upon the popular vote. Being designed for the popular judgment, and owing its existence to the popular approval, its language must receive such a construction as is most consistent with plain, common sense, unaffected by any passing excitement or prejudice."[48] Similarly, Justice Cooley stated that "There are certain well settled rules for the construction of statutes, which no court can safely disregard. Where the statute is plain and unambiguous in its terms, the courts have nothing to do but to obey it....The fair and natural import of the terms employed, in view of the subject matter of the law, is what should govern....These rules are especially applicable to constitutions; for the people, in passing upon them, do not examine their clauses with a view to discover a secret or a double meaning, but accept the most natural and obvious import of the words as the meaning designed to be conveyed."[49]

This being the case, then, the meaning of a constitutional provision is to be garnered understanding that the ratifiers looked to the words employed "in the sense most obvious to the

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[45] Cooley, *Constitutional Limitations*, at 66.

[46] *People v Blodgett,* 13 Mich 127 (1865).

[47] *Blodgett*, at 141.

[48] *Blodgett*, at 141.

[49] *Blodgett*, at 167-168.

common understanding, and ratified the instrument in the belief that that was the sense to be conveyed."[50] When the Constitution of 1963 was proposed to the People of the State for ratification, each section carried with it an explanatory "Convention Comment" to the ratifiers. The comment to Article 1, § 15, declared that "This is a revision of Sec. 14, Article II, of the present constitution. The new language of the first sentence involves the *substitution of the jeopardy provision from the U.S. Constitution in place of the present provision which merely prohibits 'acquittal on the merits.'* This is more consistent with the actual practice of the courts in Michigan." It was thus the intention of the framers to substitute the federal jeopardy provision for the more limited Michigan provision, and in words "obvious to the common understanding" this was specifically stated to the People of the State before the ratification vote. And, as stated by Justice Frankfurter, "If a word is obviously transplanted from another legal source, whether the common law or other legislation, it brings its soil with it."[51]

It is thus inescapable that:

- Article 1, § 15, does not differ in its text in any material way from the Fifth Amendment provision;
- the very intent of the drafters of the provision was to substitute for the prior narrower provision the language of the Fifth Amendment precisely because the narrower state provision, despite its clear language, had been construed by this court in a manner consistent with the Fifth Amendment language, and
- that in plain language this intention was conveyed to the ratifiers.

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[50] Cooley, at 66.

[51] Frankfurter, "Some Reflections on the Reading of Statutes," 47 Colum L Rev 527, 537 (1947).

Not only is there a presumption, then, that in replicating the Fifth Amendment the intent of the framers and the ratifiers was to have a congruent meaning between the two provisions, but that intent is laid bare with regard to Article 1, § 15. How, then, *had* the Fifth Amendment jeopardy protection been construed at the time of the ratification of Article 1, § 15?

(2) **Federal Jurisprudential History**

When a phrase or provision is borrowed from another source, it brings its construction with it. There is thus a presumption that the construction existing in the jurisdiction where the provision was borrowed applies as well in this state; there is no such presumption as to *subsequent* constructions by that jurisdiction, though they may well be entitled to great weight in the analysis.[52] With regard to the matter at issue here–the meaning of the word "offense"–what federal construction existed at the time Michigan specifically and intentionally "borrowed" the Fifth Amendment jeopardy provision? In Justice Frankfurter's language, what "soil" came with the plant?

Early English commentators and cases discuss *auterfoits acquit* and *auterfoits convict* using examples that are startlingly similar to the present case. Hale said that:

> If A. commit a burglary in the county of B. and likewise at the same time steal goods out of the house, if he be indicted of larciny for the goods and acquitted, yet he maybe indicted for the burglary notwithstanding the acquittal.
>
> And *e converso*, if [53]indicted for the burglary and acquitted, yet he may be indicted for the laciny, for they are several offenses, tho committed at the same time.

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[52] See *People v Messer*, 148 Mich 168 (1907).

[53] 2 M. Hale, *Pleas of the Crown*, p. 245-256 (1736 ed.).

In an English case, the defendant was acquitted on the charge of burglary by breaking into a house and stealing the owner's money, and was charged again with burglary for breaking and entering and stealing the money of the owner's servant. The court would not allow the second burglary charge, but held that the larceny charge was good.[54] And in *King v Vandercomb*[55] almost a precise statement of the federal "same elements" test was set out as governing successive prosecutions. In this country, a Massachusetts case set out the rule:

> In considering the identity of the offense, it must appear by the plea, that the offence charged in both cases was the same in law and in fact. The plea will be vicious, if the offences charged in the two indictments be perfectly distinct in law, however nearly they may be connected in fact....[56]

These principles have deep roots also in cases from the United States Supreme Court.

An argument against successive prosecutions was rejected in *Burton v United States*,[57] the Court citing the Massachusetts case quoted above, and holding "It must appear that the offense charged, using the words of Chief Justice Shaw, 'was the same *in law* and *in fact*.'" In the oft-cited case of *Gavieres v United States,*[58] the defendant was convicted for the use of certain language to a public official with behaving in an intoxicated or indecent manner to the annoyance of another person. He was then convicted, for the same conduct, under a statute prohibiting insulting or

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[54] *Turner's Case*, 84 Eng Rep 1068 (K.B. 1708).

[55] *King v Vandercomb*, 168 Eng Rep 455 (K.B. 1796).

[56] *Commonwealth v Roby*, 12 Pickering 496 (Mass, 1832).

[57] *Burton v United States*, 202US 344, 380, 26 S Ct 688, 50 L Ed 1057 (1906).

[58] *Gavieres v United States*, 220 US 338, 31 S Ct 421, 55 L Ed 489 (1911).

threatening public officials in their presence, and claimed the second prosecution was barred by the first. The Court rejected this argument:

> It is true that the acts and words of the accused set forth in both charges are the same; but in the second case it was charged, as was essential to conviction, that the misbehavior...was addressed to a public official. In this view we are of opinion that while the *transaction charged is the same in each case, the offenses are different.*[59]

This test was also followed in *Blockburger v United States*;[60] indeed, the Court's formulation of the test–that offenses are separate so long as each requires proof of an element the other does not–became known clearly as the "elements test," and save for one short anomalous period, has held the field ever since.[61]

The soil that came with the Fifth Amendment jeopardy provision when it was transplanted into the Michigan Constitution, then, included the understanding that offenses are the "same offense" when it *cannot* be said that each includes an element that the other does not. And it should be noted that other than two *ad hoc* situations–the same transaction test, and dual sovereignty jeopardy considerations–this court has repeatedly held that the Michigan jeopardy provision carries the same meaning as the Fifth Amendment.[62]

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[59] *Gavieres*, at 342 (emphasis supplied).

[60] *Blockburger v United States*, 284 US 299, 52 S Ct 180, 76 L Ed 306 (1932).

[61] In *Grady v Corbin*, 495 US 508, 110 S Ct 2084, 109 L Ed 2d 548 (1990) the Court added a "same conduct" element; that alteration was short lived, as in 1993 *Grady* was overruled in favor of a return to the pure elements test of *Blockburger*. *United States v Dixon,* 509 US 688, 113 S Ct 2849, 125 L Ed 2d 556 (1993).

[62] See e.g. *People v Wakeford,* 418 Mich 95, 124 (1983) ("...the scope of the Double Jeopardy Clause has generally been regarded as the same under both the Michigan and United States Constitutions"); *People v. Harding,* 443 Mich 693, 725 (1993)("...this Court has uniformly

C. Conclusion

In *People v White* this court departed from the meaning of the term "same offense" as it was understood when our current constitution was framed and ratified, appearing to anticipate, incorrectly, the direction of the United States Supreme Court. In so doing, it amended the constitution, a sovereign act that may be accomplished only in the manner set forth in the document that the people ratified. Principles of *stare decisis* do not stand in the way of correction. This court should return to the "same elements" test for jeopardy protection, as a matter of state constitutional law.

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held that the Michigan Constitution was intended by its ratifiers and framers to embody those principles derived from the English common law, and, therefore, is also consistent with the Fifth Amendment of the United States Constitution").

Relief

Wherefore, amicus requests that the Court of Appeals be reversed..

Respectfully submitted,

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